NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

93-6892

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P.O. Box 449
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(505) 766-3293
By: Joseph W. Gandert
Attorney for Petitioner

SERVICE TO:

Solicitor General
Department of Justice
Washington, DC 20530

November, 1993

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NO. _____

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DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Joseph W. Gandert, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this Court and counsel for petitioner, Matthew Wayne Tome, and that I personally mailed the petition for certiorari to this Court by depositing the original and nine copies in an envelope addressed to the Clerk of this Court, sealed the envelope, and deposited it in the United States mailbox at the U.S. Post Office at 500 Gold Avenue SW, Albuquerque, New Mexico, at approximately 4:00 p.m. on the 24 day of November, 1993.

Joseph W. Gandert
Attorney for Petitioner

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Matthew Wayne Tome, through his attorney who was appointed pursuant to the Criminal Justice Act, 18 U.S.C. §3006(A), respectfully moves this honorable Court to grant leave to continue to proceed in forma pauperis. In support of this motion, counsel declares under penalty of perjury:

1. The Federal Public Defender Organization for the District of New Mexico is organized pursuant to 18 U.S.C. §3006(h)(2)(A).

2. Pursuant to the Criminal Justice Act, 18 U.S.C. §3006(A), the United States Magistrate for the District of New Mexico appointed the Federal Public Defender Organization for the District of New Mexico on June 26, 1991, to represent petitioner, Matthew Wayne Tome, on federal criminal charges brought against him before the United States District Court.

3. Following appeal to the United States Court of Appeals for the Tenth Circuit, that court appointed the Office of the Federal Public Defender on September 11, 1992, to represent petitioner in connection with the appeal of this conviction. One of the duties of counsel appointed in the Tenth Circuit is to represent petitioner in a petition for a writ of certiorari if petitioner so requests.

4. Pursuant to Tenth Circuit Rule 24.1, a party who has been permitted to proceed in an action in District Court in forma pauperis may proceed on appeal without further authorization unless the District Court certifies otherwise.

5. Following the issuance of the Tenth Circuit's opinion in this case, petitioner has requested that his appointed Federal Public Defender present this petition to this Court.

6. As far as counsel is aware, petitioner continues to be indigent.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293

Joseph W. Gandert
Attorney for Petitioner

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER EVIDENCE OF A PRIOR CONSISTENT STATEMENT IS INADMISSIBLE UNDER FED. R. EVID. 801(d)(1)(B) TO REBUT A PRE-EXISTING MOTIVE TO FABRICATE.

II. WHETHER THE ADMISSION OF TESTIMONY CONCERNING A CHILD'S PRIOR STATEMENTS VIOLATES FED. R. EVID. 801(d)(1)(B) WHEN THE CHILD IS EFFECTIVELY UNAVAILABLE FOR CROSS-EXAMINATION CONCERNING THOSE STATEMENTS.

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NO. _____

SUPREME COURT OF THE UNITED STATES

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MATTHEW WAYNE TOME,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Matthew Wayne Tome, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, case number 92-2104, is attached in the Appendix.

JURISDICTION

The Tenth Circuit Court of Appeals' judgment that is sought to be reviewed was filed and entered on August 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. §2101(c), this petition is timely if filed by November 24, 1993.

FEDERAL RULE OF EVIDENCE

The provision of the Federal Rules of Evidence involved in this case is the following:

Fed. R. Evid. 801(d)(1)(B), which provides:

> (d) Statements which are not hearsay. A statement is not hearsay if--
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, ...

STATEMENT OF THE CASE

On June 4, 1991, Matthew Wayne Tome was charged in a one-count indictment with engaging in sexual acts with a female Indian child under the age of twelve years, in violation of 18 U.S.C. §§1153, 2241(c), and 2245(2)(A)(B). Tome received a jury trial, which was held from February 24, 1992, through March 2, 1992. On March 3, 1992, the jury returned a guilty verdict. On May 15, 1992, the District Court sentenced Tome to a term of imprisonment of 144 months.

The accusations giving rise to the charges against Matthew Tome in this case were raised during the course of a long and bitter custody dispute between Tome and his ex-wife, Beverly Padilla. The couple were divorced in September, 1988, by decree of the Navajo Tribal Court. The court awarded joint custody of their only child, Andrea, born June 18, 1985, to both parents with primary physical custody to Tome.

Between September, 1988, and May, 1989, Tome had custody of Andrea during weekdays; Padilla had custody on the weekends. During this time, Andrea attended a head start program. Tome and Padilla alternated custody of Andrea every two weeks during the summer of 1989. Andrea was with her mother from June 16, 1989, through June 30, 1989.

In mid-1989, Padilla applied to the Navajo Tribal Court to modify the custody order concerning Andrea to give her primary custody. Following a hearing on August 24, 1989, the court denied Padilla's petition for a change of custody. Tome

maintained primary custody of Andrea during the 1989-90 school year; Padilla received custody on weekends and throughout the summer of 1990.

The summer of 1990 represented the longest continuous time period in which Padilla maintained custody of Andrea since the time of the divorce. By this time, Padilla had remarried and was residing with her new husband and their infant son in Colorado Springs, Colorado.

A court hearing was scheduled for August 22, 1990, to review custody arrangements concerning Andrea. Padilla did not attend that hearing; she testified at defendant's trial that she mistakenly believed that the hearing was to be held two days later. The tribal court ordered that Tome retain primary custody of Andrea and that Padilla continue to receive visitation.

The government maintained that the offense with which Tome was charged occurred on or about June 18, 1989. At trial, Andrea was the government's first witness. Although she was able to respond to preliminary inquiries, her testimony on direct examination about the alleged abuse consisted almost entirely of supplying the indicated answer to a series of leading questions by government counsel.

On cross-examination, Andrea responded to questions posed by defense counsel about extraneous matters, but failed to respond to nearly all queries concerning the charged offense. She did state her belief that the possible outcome of her court testimony was that her mother would go to jail. The trial court noted that

the child did not respond to even simple questions and that she would sometimes wait 40 or 45 seconds after a question without responding.

The court permitted Lisa Rocha to testify, over defendant's hearsay objection, after listening to her testimony outside the presence of the jury. Rocha was a friend of Padilla's who cared for Andrea in Colorado Springs during the summer of 1990. She testified that on August 22, 1990, she was caring for Andrea, and that Andrea came up to her and said, "Please don't let my mom take my [sic] back to my father." When Rocha asked her "why", she said, "Because I don't want to go back." To Rocha's repeated "why" question, Andrea was said to have responded, "Because my father gets drunk and he thinks I'm his wife."

Rocha did not relate Andrea's statement to Padilla until Sunday, August 26, 1990, when she phoned Padilla and asked her to find out from Andrea what she meant. On the following day, Rocha called Padilla again to find out what had happened. Padilla told her that she had not spoken with Andrea about what Rocha had told her. Shortly thereafter, Padilla called Rocha back and asked her to come over to her apartment to speak with Andrea because Andrea would not speak with her mother. Rocha went over as asked.

Rocha testified that she asked Andrea to explain what she meant by saying that her dad thinks she's his wife. Andrea allegedly told Rocha at that time that her father had sexually abused her. Rocha related what Andrea told her to Padilla.

Padilla testified that Andrea refused to explain to her what she meant by telling Rocha that her father gets drunk and thinks of her as his wife. During Rocha's alleged conversation with Andrea concerning the abuse, Padilla went to another room, from where she was able to overhear only a little of what was said. Padilla was permitted to testify about what she allegedly overheard Andrea tell Rocha about the sexual abuse.

Kae Ecklebarger, who had previously been employed as a social worker with Protective Services, testified that her office first received a report concerning Andrea Tome on August 28, 1990. The following day, she met with Andrea, her mother, and Rocha. Padilla and Rocha informed Ecklebarger of the sexual abuse allegations prior to Ecklebarger's interview with Andrea. Ecklebarger testified that she began her interview with Andrea by asking her if she knew why she was there. Andrea was said to have responded that she was there because of what Matthew [her father] had done to her. Ecklebarger testified in detail about what the child told her concerning the alleged abuse.

Dr. Karen Kuper, a pediatrician, testified that Andrea was referred to her by Kae Ecklebarger because of the sexual abuse allegations. She saw Andrea on two occasions, in September and October of 1990. On the first occasion, she interviewed Andrea in the presence of her mother. Kuper testified about Andrea's specific allegations of sexual abuse by her father which the child demonstrated to her through use of a doll.

Dr. Laura Reich, a pediatrician, testified that she examined Andrea on September 21, 1990, in order to treat her for a rash in the vaginal area which Reich determined to have been unrelated to any sexual abuse. Andrea's mother informed Reich, prior to her examination of Andrea, that Dr. Kuper had recently seen her for possible sexual abuse. Reich testified that Andrea told her that her father had sexually abused her.

Dr. Jean Spiegel, also a pediatrician, testified concerning her physical examination of Andrea. She also was permitted to testify concerning Andrea's account of the alleged sexual abuse.

Matthew Tome took the stand in his own defense and denied ever sexually abusing Andrea. He testified about problems between him and Padilla concerning custody arrangements. Tome stated that Padilla often complained about how he cared for Andrea.

While Tome had custody of Andrea, she lived with him, his sister, Sheba, his brother, and his parents in Mitton Rock, New Mexico. Tome's sister and mother, Sheba and Sadie Tome, both testified that they never saw any indications of sexual abuse while Andrea lived with them and that Andrea had a good relationship with them and with her father.

Samuel Pete, a Navajo Tribal Court Advocate, testified concerning his representation of Tome during divorce and custody proceedings in the Navajo court. In November, 1990, the Navajo Tribe, through the prosecutor's office, filed a dependency action concerning Andrea Tome. Dependency actions are filed in cases

involving allegations of neglect, abandonment, or abuse of a child. A hearing was held on January 24, 1991, at which Pete represented Tome. By tribal court order of February 15, 1991, Beverly Padilla received physical custody of Andrea and Tome was granted visitation rights.

During the course of the tribal court dependency proceedings, Tome took a polygraph examination concerning the allegations of sexual abuse of Andrea. The results indicated that he was truthful in his denials of sexual abuse.

Ida Nakai, an assistant teacher, and Cecilia Atcitty, a teacher's aide, both from the head start preschool program which Andrea attended for two years while in Tome's custody, testified on his behalf. Tome was actively involved in the school as the local parent president. They testified that Andrea Tome was a happy, well-adjusted child during the time she attended their school. Marjorie Owen and Leonard Anthony, who also knew Tome through his active involvement with the head start program, testified that Tome was a truthful person in his dealings with them. Anthony testified that Tome demonstrated commitment to advancing the educational goals of the community and that he was a strong leader. Janice Kavadas, a teacher who had known Tome since his high school days, and Ralph Wegner, Tome's employer for five years, testified that he was a very honest and trustworthy person.

On appeal to the United States Court of Appeals for the Tenth Circuit, Tome challenged inter alia, the trial court's

admission of the testimony of Rocha, Padilla, Ecklebarger, Kuper, Reich, and Spiegel with regard to Andrea's statements about sexual abuse by her father. Tome maintained that none of the child's statements to the six witnesses served to rebut any implied charge by defense counsel that the child's accusations were motivated by a desire to live with her mother because, as both parties agreed, the motive pre-existed the statements. The Tenth Circuit, in its opinion appended hereto as Attachment ("Att.") A, rejected the pre-motive rule and concluded that the testimony of all six witnesses concerning the child's statements was properly admitted as substantive evidence under Fed. R. Evid. 801(d)(1)(B).

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THIS CASE PRESENTS THE IMPORTANT ISSUE OF WHETHER EVIDENCE OF A PRIOR CONSISTENT STATEMENT IS INADMISSIBLE UNDER FED. R. EVID. 801(d)(1)(B) TO REBUT A PRE-EXISTING MOTIVE TO FABRICATE. THERE IS A SHARP CONFLICT AMONG THE CIRCUIT COURTS ON THIS QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

Fed. R. Evid. 801(d)(1)(B) does not address whether a prior consistent statement must antedate the existence of the alleged motive to fabricate. Not surprisingly, the rule has spawned myriad interpretations among the circuit courts of appeal. As the Tenth Circuit noted in its opinion in this case, the question of the admissibility of prior statements which do not precede the existence of the alleged motive to fabricate "has divided the other circuits for years." Att. A at 15. In recent years, the conflict on this issue has intensified.

In rejecting the pre-motive rule and concluding that the prior consistent statement need not precede the alleged motive to fabricate, the Tenth Circuit aligned itself with the Fifth, Eleventh, and D.C. Circuits. See U.S. v. Parry, 649 F.2d 292, 296 (5th Cir. Unit B, June 1981); U.S. v. Farmer, 923 F.2d 1557, 1568 (11th Cir. 1991); U.S. v. Montague, 958 F.2d 1094, 1098 (D.C. Cir. 1992). The Second, Seventh, Eighth, and Ninth Circuits, on the other hand, have held that prior consistent statements should not be admitted under Rule 801(d)(1)(B) if the motive to fabricate antedates the statements. See U.S. v. Simmons, 923 F.2d 934, 943 n.3 (2nd Cir.), cert. denied, -- U.S. --, 111 S.Ct. 2018 (1991) (evidence is admissible under Rule 801(d)(1)(B) to rebut charged motive to fabricate only if

statement pre-existed motive); U.S. v. Lewis, 954 F.2d 1386, 1391 (7th Cir. 1992) (same); U.S. v. Bowman, 798 F.2d 333, 338 (8th Cir.), cert. denied, 479 U.S. 1043 (1987) (better rule requires that prior consistent statement precede motive to fabricate); U.S. v. Smith, 893 F.2d 1573, 1581 (9th Cir. 1990) ("a prior consistent statement is admissible only if it was made before the witness had a motive to fabricate." (citing Breneman v. Kennecott Corp., 799 F.2d 470, 472 (9th Cir. 1986)).

Courts have traditionally exercised great caution in admitting evidence of prior consistent statements. "For nearly 200 years last past, the courts have enforced, except in certain very limited circumstances, a general prohibition against the use of prior consistent statements." U.S. v. Quinto, 582 F.2d 224, 232 (2nd Cir. 1978). Prior to enactment of the federal rules, courts generally admitted evidence of consistent statements only for rehabilitative purposes. Id. at 232-33. Rule 801 permits substantive use of prior consistent statements formerly admitted only for rehabilitative purposes.[1]

In U.S. v. Casoni, 950 F.2d 893, 905-906 (3rd Cir. 1991), the court pointed out that Rule 801(d)(1)(B) is inherently confusing. Rule 801 initially states that hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). In Fed. R. Evid. 801(d)(1)(B),

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[1] The Advisory Committee Note to Rule 801 states, "Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence."

the rule provides a hearsay exception for a statement if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence of motive." As noted in Casoni, however, a statement is not hearsay if it is not offered to prove the truth of the matter asserted. Id. at 905. While the Advisory Committee indicated its intent that prior consistent statements be admitted as substantive evidence, the rule itself contains no such provision. As the court commented in Casoni,

> This still leaves us with a problem concerning the internal logic of the rule itself, which takes a prior consistent statement out of the hearsay category because it is offered only for rehabilitative purposes instead of for the truth of the matter asserted but then inconsistently permits its use to prove the truth of the matters it asserts.

Id. at 905.

A prior consistent statement antedating a motive to fabricate demonstrates that the testimony is reliable despite the motive. A prior consistent statement does not serve to refute a charged motive to fabricate if the declarant's motive was the same at the time of the statement as at the time of trial. Although a statement made after the declarant has a motive to fabricate may be relevant to prove the underlying facts, it is inadmissible under Rule 801(d)(1)(B). In United States v. Harris, 761 F.2d 394 (7th Cir. 1985), the court explained that a prior consistent statement lacks probative value if it was made after the existence of a motive to fabricate:

> [E]vidence which merely shows that the declarant said the same thing at trial as he did on a prior occasion

> is of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same[,] for the simple reason that mere repetition does not imply veracity.

Id. at 399.

In Montague, as in the instant case, the appellant maintained that a prior consistent statement was improperly admitted under Rule 801(d)(1)(B) because the declarant had the same motive for fabrication at the time of the statement as at trial. The statement in question was made by the defendant's former co-defendant subsequent to arrest and prior to leniency discussions. The court of appeals reviewed the varied positions of its sister courts on this question. Noting that strict adherence to the appellant's position would almost totally preclude the admission of a cooperating defendant following arrest, the court ruled that "[t]he fact that a prior consistent statement was made after the appearance of a motive to fabricate does not render it per se outside the terms of Rule 801(d)(1)(B)." Id. at 1099. Judge Wald, while concurring in the result, dissented on the ground that a prior statement should be inadmissible under Rule 801(d)(1)(B) if made during leniency discussions with the government. "The fact that the witness said the same thing, at a time when the same alleged motive was operative, provides no counterweight to the charge that she is saying it now because of that motive." Id. at 1100 (Wald, J. dissenting).

In its decision herein, the Tenth Circuit relied on U.S. v. Payne, 944 F.2d 1458, 1470-72 (9th Cir.), cert. denied, -- U.S. -

-, 112 S.Ct. 1598 (1992), and U.S. v. Miller, 874 F.2d 1255, 1274-75 (9th Cir. 1989). In those cases, the Ninth Circuit upheld admission of prior consistent statements to rebut evidence of inconsistent statements, finding that the alleged motive to fabricate in both cases was speculative. In this case, the child's motive in coming forward with her allegations was anything but speculative.

Both the district court and the Tenth Circuit determined that defense counsel impliedly charged the child with fabricating the allegations of abuse in this case in order to remain with her mother in Colorado. Att. A at 14. Testimony indicated that the child's first remark regarding the abuse was her statement to Rocha, "[p]lease don't let my mom take my [sic] back to my father." When asked to explain, the child said, "[b]ecause I don't want to go back"; she later added, "[b]ecause my father gets drunk and he thinks I'm his wife."

The child made the above statements on August 22, 1990, the same day on which the tribal court upheld the custody decree which called for her return to her father and for him to retain primary custody. The child's initial statement expressly states that she wished to remain with her mother and not return to live with her father. Her motive in coming forward was thus irrefutable. While the child's out-of-court statements might explain the basis for that motive, they could not rebut the existence of the motive. The government's true purpose in offering third party testimony concerning the child's out-of-

court statements was to prove the truth of her accusations against Tome, an impermissible purpose under Fed. R. Evid. 801(d)(1)(B).

The child's statement at the time of her initial allegation of sexual abuse, that she did not wish to return to live with her father, also demonstrates that she was subject to the same motivation at the time of her prior consistent statements as at the time of trial. In fact, the government and the defendant agreed that if there was any alleged fabrication or improper influence or motive, it arose by August 22, 1990, the date when the child first approached Rocha concerning the accusations of abuse. Evidence of statements made on and after that date could not serve to rebut the pre-existing motive to fabricate.

The Tenth Circuit's application of Fed. R. Evid. 801(d)(1)(B) herein is also insupportable because it is based upon inconsistent and self-contradictory reasoning. The court concluded that the defense had charged the child with a motive to fabricate to a degree that opened the door to rebuttal through evidence of prior consistent statements recounted by six witnesses. The court also concluded that because the defendant presented insufficient evidence of the child's ability to fabricate, the existence of the motive to fabricate at the time of the consistent statements should not preclude testimony concerning those statements. Att. A at 19. The court's second conclusion undermines the first. If the child lacks the ability

to act on a motive to fabricate, there is little justification for permitting rebuttal of the motive to fabricate.

This case illustrates the unfairness that may result from improper admission of evidence under 801(d)(1)(B). One after another, witnesses were permitted to repeat a sordid account of Tome's alleged abuse of his daughter. Most of these witnesses were professionals with impressive credentials. While the repetition of the statements was not probative of their truthfulness, the allegations undoubtedly assumed greater plausibility with each well-respected witness who related them. The jury likely overlooked the fact that none of these witnesses had any firsthand knowledge concerning the truth of the accusations they repeated. By admitting the disputed hearsay testimony under 801(d)(1)(B), the court permitted the government to impermissibly bolster the child's testimony.

The danger of liberal admission of evidence of prior consistent statements without adherence to the restrictions imposed by 801(d)(1)(B) was explicated by the court in Allison v. State, 162 So.2d 922 (Fla. 1 DCA 1964):

> [A] witness's testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness.

Id. at 924. In explaining the rationale for its decision, the court in this case pointed to the fact that the child spontaneously made her initial allegation of abuse. Att. A at

19. While that may be a valid consideration, it hardly supports admission of the testimony of six witnesses recounting the child's account of abuse.

The Tenth Circuit decision in this case establishes a dangerous precedent. This Court should accept certiorari in this case in order to settle the conflict between the circuit courts which is epitomized by this case, and to establish the proper application of Fed. R. Evid. 801(d)(1)(B).

II. THE ADMISSION OF TESTIMONY CONCERNING A CHILD'S PRIOR STATEMENTS VIOLATES FED. R. EVID. 801(d)(1)(B) WHEN THE CHILD IS EFFECTIVELY UNAVAILABLE FOR CROSS-EXAMINATION CONCERNING THOSE STATEMENTS. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE ADDRESSED BY THIS COURT.

Although the government physically produced the child, she was for all intents and purposes, unavailable for cross-examination concerning her prior consistent statements as required by Fed. R. Evid. 801(b)(1)(D). As the prosecutor, Ms. Neda, even stated during the course of trial, "[I]n this case I would say in many instances the child, in effect, has not been available . . ." Ms. Neda also acknowledged the child's "inability to articulate what happened to her because of her age." On direct examination, the child was able to answer virtually no substantive questions concerning the alleged sexual abuse without leading questions from the prosecutor. She did not testify on direct examination about her out-of-court statements. On cross-examination, the child gave no response at all to numerous questions posed by defense counsel, particularly those

that concerned her statements to other prosecution witnesses. As the trial court noted,

> ...[I]ntegrals of time have elapsed between the time that the question is finished until the next question is asked of up to as much as 45 or 50 seconds.
>
> I don't know what the reason for that is of the witness' inability to comprehend. I sense that some questions are in that category, but there are other questions that appear to be rather simple questions, and the witness nevertheless has not responded and has waited for the next question as much as, as I say, 40, 45 seconds, many times 20 seconds, 25 seconds. And I've been timing that with my watch.
>
> I don't know what the significance of that may be except insofar as the application of some of the authorities on hearsay statements, and I suppose that we will be addressing that point sometime later in the trial, whether there's an element of, quote, unavailability, end quote, of the witness even though the witness is here.
>
> We have a very unusual situation insofar as this witness is concerned. I would note also on the record that when we started this recess, the witness seemed to be losing concentration. She would look up to the ceiling, would look to the back of the courtroom, she would look over my head, would not in instances face counsel who is inquiring of her.
>
> She twisted and turned, stretched a little bit sometimes. At other time she would put her hand to her mouth and clasp her lips with her hand. We have a very difficult situation here.
>
> In any event, I thought that the record should reflect some of those things. The long pauses between questions, particularly questions that are not answered.

As the Tenth Circuit noted at page 10 of its decision herein, this Court determined in U.S. v. Owens, 484 U.S. 554 (1988), that "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." Id. at 561. The Tenth Circuit concluded that the child in this case willingly responded to defense counsel's queries. Att. A at 13. As illustrated by

the following examples of defense counsel's attempts to question the child about her out-of-court statements, however, Tome's opportunity to cross-examine the child about her prior statements was a mere formalism.

> Q . . . The something that Tara [prosecutor's first name] asked you about in court that happened with Matthew, did you talk about that with other people or just with Tara.
>
> A Just with Tara.
>
> Q She's the only person you talked about that with?
>
> A Yes.
>
> * * * * * * * * * * * * * *
>
> Q What you talked about with Tara about Matthew, did you talk about that with a baby-sitter, any babysitter at all?
>
> A No.
>
> * * * * * * * * * * * * * *
>
> Q [W]hat you told Tara about Matthew, whatever it was, did you tell that to any doctor? And you can say yes or no or you don't remember.
>
> A (No audible response.)
>
> Q Do you remember, Andrea?
>
> A No.
>
> * * * * * * * * * * * * * * * * *
>
> Q ***When you talked to Dr. Kuper, do you remember telling her the truth or not the truth, do you remember?
>
> A No.

The child at various points during cross-examination denied having made any of the numerous out-of-court statements testified to by government witnesses, stated she could remember neither

whether she had made some of those statements nor whether she had told the truth, and failed entirely to respond to continued defense counsel queries about the statements. The defendant in this case was convicted without meaningful opportunity to test the veracity of the out-of-court statements of the only witness with firsthand knowledge of the accusations against him.

The impossible situation faced by defense counsel in attempting to cross-examine the child concerning her prior consistent statements greatly exceeds the case in which the witness merely suffers from lack of memory or testifies inconsistently. While the witness in Owens was at least able to affirm that he told the truth at the time of his prior statement, the child in this case was unable to so testify. Both the prosecutor and the trial court agreed that the child must to some degree be considered unavailable. The child's reluctance to respond, although understandable, prevented defendant from exercising the right of cross-examination to which he was entitled under Fed. R. Evid. 801(d)(1)(B).

Other courts have recognized that child witnesses called to testify at trial were effectively unavailable. In United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986), the court concluded that the five-year-old witness "was simply unable to testify meaningfully at trial", id. at 1445, and "was, for all practical purposes, 'unavailable.'" Id. at 1446. In United States v. Spotted War Bonnet, 933 F.2d 1471 (8th Cir.), cert. denied, -- U.S. --, 112 S.Ct. 1187 (1992), the court determined that the

defendant received adequate opportunity to cross-examine the two young victims to protect his confrontation rights. The court noted, however,

> To be sure, simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns. If, for example, a child is so young that she cannot be cross-examined at all, or if she is "simply too young and too frightened to be subjected to a thorough cross-examination[,]" United States v. Dorian, supra, 803 F.2d at 1446, the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause.

Id. at 1474. While these cases did not address witness unavailability for cross-examination under Fed. R. Evid. 801(D)(1)(B), they demonstrate the problem posed by unresponsive young witnesses which in this case prevented Tome from exercising his right to cross-examination about the prior statements recounted by six prosecution witnesses.

This Court should accept certiorari in this case in order to decide this important federal question and to guide the circuit courts in the appropriate application of Fed. R. Evid. 801(d)(1)(B).

CONCLUSION

For the reasons stated above, petitioner Matthew Wayne Tome requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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PUBLISH

FILED
United States Court of Appeals
Tenth Circuit

AUG 26 1993

ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 92-2104
MATTHEW WAYNE TOME, Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CR-91-314-SC)

Joseph W. Gandert, Assistant Federal Public Defender, of Albuquerque, New Mexico, for the Defendant-Appellant.

Louis M. Fischer (Don J. Svet, United States Attorney, District of New Mexico, and Tara C. Neda, Assistant United States Attorney, District of New Mexico, with him on the brief), Attorney, Department of Justice, Washington, D.C., for the Plaintiff-Appellee.

Before **ANDERSON**, **HOLLOWAY**, and **TACHA**, Circuit Judges.

TACHA, Circuit Judge.

Matthew Wayne Tome ("Tome"), a Native American residing on the Navajo Indian Reservation in New Mexico, was convicted of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153, 2241(c), and 2245(2)(A)(B). Mr. Tome appeals his conviction, challenging the admission of certain hearsay testimony and the government's use of leading questions. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

A.T. is the daughter of the defendant and his ex-wife, Beverly Padilla. A.T. was born on June 18, 1985. Tome and Padilla divorced in September 1988. The Navajo Tribal Court awarded Tome and Padilla joint custody of A.T. but granted Tome primary physical custody. From September 1988 until May 1989, Tome had custody of A.T. on weekdays while Padilla had custody on weekends. Tome and Padilla alternated custody of A.T. every two weeks during the summer of 1989, with Padilla having custody from June 16 to June 30, 1989.

In August 1989, Padilla petitioned the Navajo Tribal Court for primary custody of A.T. The Tribal Court denied the petition but awarded Padilla custody during the summer of 1990. At this time, Padilla had remarried and was living in Colorado. A follow-up custody hearing was scheduled for August 24, 1990. Padilla and A.T., however, did not attend that hearing. Rather, on August 27, 1990, Padilla contacted Colorado authorities with allegations that A.T. had been sexually abused by her father, Tome. On August 22, 1991, a superseding indictment charged Tome with knowingly

engaging is sexual acts with his daughter, an Indian child under the age of twelve, in violation of 18 U.S.C. § 1153, 2241(c) and 2245(2)(A)(B). In a Bill of Particulars filed September 10, 1991, the government alleged that the conduct in question occurred on or about June 18, 1989, when A.T. was four years old. Tome's trial began on February 24, 1992.

The government called A.T. as its first witness. She was six and one-half years old at the time of trial. After the court extensively questioned A.T. concerning her ability to distinguish the truth from a lie, she testified before the jury. On direct examination, her testimony consisted mostly of one and two-word answers. In addition, the trial judge permitted the prosecutor to use leading questions to develop A.T.'s testimony pertaining to the alleged sexual abuse. The prosecutor asked mainly "yes or no" questions and also had A.T. demonstrate details of the abuse by using dolls and having A.T. point to parts of the prosecutor's body. Through these means, A.T. testified that Tome removed her clothes, got on top of her, and put his private place where she goes potty and in her mouth. She further testified that after this happened she went to the bathroom and wiped blood off herself with a tissue.

A.T.'s cross-examination occurred over two days, beginning on a Monday afternoon and resuming the following Wednesday morning. On the first day, defense counsel covered numerous topics all unrelated to the alleged abuse. She first established that A.T. knew the prosecutor on a first-name basis but did not know the judge or any of the defense counsel. She then questioned A.T.

about the difference between living with her father in New Mexico and her mother in Colorado, focusing on the reasons she might have for wanting to live with her mother. A.T.'s responses to these question on the first day were immediate and ranged from single word responses to complete and relatively detailed sentences.

When A.T.'s cross-examination resumed two days later, it was strained. Almost from the start, when defense counsel asked A.T. about any conversations she had had with the prosecutor on Tuesday, A.T. often provided no audible response. Defense counsel then asked A.T. if she missed her mother when staying in New Mexico and asked her what she thought might happen to her or her mother when they went to court. A.T. testified that she did miss her mother and that she thought that she would be returned to her father while her mother went to jail. After a recess, defense counsel asked A.T. whether she had discussed the alleged abuse with anyone besides the prosecutor and, if so, whether she knew the occupations of those persons. A.T. testified to discussing the matter with several physicians and social workers and stated that their jobs were "to help kids." On recross-examination, when A.T. was asked to describe her testimony on direct examination, she answered that it was "the truth." Defense counsel chose not to ask A.T. about the details of the alleged sexual abuse.

The government also produced several witnesses who testified about statements A.T. made to them. The first witness was Lisa Rocha, A.T.'s baby-sitter and a close friend of A.T.'s mother. Rocha testified that, while she was baby-sitting A.T. on August 22, 1990, A.T. spontaneously told her, "Please don't let my mom

take me back to my father." Rocha testified that, when asked why, A.T. remarked that her "father gets drunk and he thinks I'm his wife." Rocha told Padilla about this incident five days later, on August 27, 1990, at which time she and Padilla attempted to question A.T. further about her accusations. When A.T. would not speak with her mother, Padilla left the room. Rocha testified that A.T. said that her father "does nasties to me," which consisted of taking her clothes off, forcing her legs open, and causing a sharp pain in her stomach when he laid on top of her. Finally, Rocha testified that A.T. related going to the bathroom and wiping blood off herself with a tissue.

Next to testify for the prosecution was Dr. Karen Kuper, a pediatrician in Colorado Springs. Kuper testified that Kae Ecklebarger, a Child Protection Service's caseworker, referred A.T. to her office. Kuper examined A.T. on two occasions in September and October 1990. As part of A.T.'s examination, Kuper interviewed her using anatomically correct dolls. Kuper testified that A.T. told her that her father hurt and scared her by putting his fingers and his "thing" in her vagina. When asked what his "thing" was, A.T. pointed to the doll's genital area. Kuper also testified that A.T. had an enlarged vaginal opening and an abnormally thin rim of hymenal tissue, and that these physical characteristics were consistent with vaginal penetration.

The testimony of Dr. Laura Reich, Chief of Pediatrics at the El Pomar Community Health Center in Colorado Springs, followed. Reich examined and interviewed A.T. on September 21, 1990. Reich testified that A.T. said that "her father had put his thing in

her." Reich further testified that A.T.'s hymen was not intact, that her vaginal opening was larger than normal, and that she had an extensive vaginal rash. Reich also testified that A.T.'s physical characteristics were consistent with vaginal penetration.

The government's next witness was Kae Ecklebarger, who was a caseworker in the Colorado Springs Child Protection Services office at the time she interviewed A.T. on August 29, 1990. Ecklebarger testified that A.T. said that her father removed her panties, put her down on the floor, and "put his balls" in her. Ecklebarger stated that A.T. demonstrated intercourse with anatomically correct dolls, attempting to insert the male doll's penis into the female doll and moving the male doll up and down on top of the female doll. Ecklebarger further testified that A.T. stated that her father kissed her on her vaginal area and asked her to touch his penis. Finally, Ecklebarger testified that A.T. said that she wiped blood from herself with a tissue, kept the tissue, and later showed it to her grandmother, saying, "Look what Matthew did to me."

A.T.'s mother, Beverly Padilla, also testified for the government. She stated that she was in the next room when Rocha was talking to A.T. on August 27, 1990. Padilla testified that she heard A.T. tell Rocha about her father pulling her legs apart.

The final witness to relate A.T.'s out-of-court statements was Dr. Jean Spiegel, a pediatrician at the University of New Mexico. Spiegel examined A.T. on September 3, 1991, when A.T. was six years old and almost two years after the abuse allegedly occurred. Spiegel testified that A.T.'s vaginal opening was

abnormally large and that she had very little hymen left. She stated that these physical characteristics were consistent with chronic vaginal penetration. On redirect examination, Spiegel testified that A.T. stated that her father touched her breasts, her "front privates," and "her bottom where her poop comes out."

On March 3, 1992, after Tome testified and presented his own evidence and witnesses, the jury convicted him on all counts. On appeal, Tome alleges the following errors: (1) the admission of alleged hearsay testimony in violation of the Federal Rules of Evidence and the Sixth Amendment's Confrontation Clause; (2) the improper use of leading questions to elicit A.T.'s testimony on direct examination; and (3) cumulative error and a fundamentally unfair trial.

II. A.T.'s Out-of-Court Statements

Tome challenges the testimony of six witnesses concerning A.T.'s out-of-court statements to them: Rocha, Ecklebarger, Padilla, Kuper, Reich, and Spiegel. In our analysis, we address whether the trial court properly admitted the testimony under the Federal Rules of Evidence and, if so, whether that testimony nevertheless violated Tome's rights under the Confrontation Clause.

A. Federal Rules of Evidence

The decision to admit evidence is within the sound discretion of the district court. United States v. Zimmerman, 943 F.2d 1204, 1211 (10th Cir. 1991). We accord heightened deference to the

trial court's hearsay rulings. See United States v. Johnson, 971 F.2d 562, 571 (10th Cir. 1992).

The government proffered the challenged testimony of everyone but Ecklebarger as not hearsay under Fed. R. Evid. 801(d)(1)(B), contending that the defense had implied, during its cross-examination of A.T., that she had fabricated the allegations of abuse in order to live with her mother in Colorado.[1] The government also contended that, even if the proffered testimony were hearsay, it all fell within one of two hearsay exceptions. The government offered the testimony of Doctors Kuper, Reich, and Spiegel under Fed. R. Evid. 803(4) as statements made for the purpose of medical diagnosis or treatment and the testimony of Rocha, Padilla, and Ecklebarger under Rule 803(24)'s "catch-all" exception as having adequate circumstantial guarantees of trustworthiness. We conclude that the testimony of all six witnesses[2] was admissable as not hearsay under Rule 801(d)(1)(B) and therefore do not address the Rule 803 hearsay exceptions.

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[1] Rule 801 defines as hearsay "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). The Rule further provides that a witness's prior statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Id. Rule 801(d)(1)(B).

[2] Although the applicability of Rule 801(d)(1)(B) was a recurring evidentiary issue, the government failed to expressly offer Ecklebarger's testimony as nonhearsay under the rule. This court, however, "is not bound by the evidentiary basis relied upon by the trial court for the admission of the challenged evidence." Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1331 (10th Cir. 1984).

Under Rule 801(d)(1)(B), evidence of a witness's prior consistent statement is not hearsay if the witness is subject to cross-examination concerning his prior statement and it is offered to rebut an express or implied charge of recent fabrication or improper motive See United States v. Sutton, 732 F.2d 1483, 1493-94 (10th Cir. 1984), cert. denied, 469 U.S. 1157 (1985). Tome contests the admission of the statements under Rule 801(d)(1)(B) on the grounds that (1) A.T. was not "subject to cross-examination concerning the statement," (2) defense counsel's attempt to cross-examine A.T. did not amount to a charge of recent fabrication or improper motive, and (3) the statements did not fall within the proper scope of the rule because they were made after the declarant had a motive to lie.

(1) Subject to Cross-Examination

We first address Tome's contention that A.T. was not subject to cross-examination as required by the rule because she was unresponsive to certain questions. The Supreme Court addressed Rule 801's cross-examination requirement in United States v. Owens, 484 U.S. 554 (1988), which involved a prison officer who suffered severe memory impairment after he was attacked and beaten with a metal pipe. Id. at 556. The officer identified his assailant to an FBI agent. At the assailant's trial, however, the officer testified that, while he remembered identifying the assailant, he could not now remember seeing his attacker. Id. The court examined the testimony under Rule 801(d)(1)(C), which has the same cross-examination requirement as Rule 801(d)1)(B).

In what it deemed "the more natural" reading of the cross-examination requirement, the Court stated that "[o]rdinarily a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions." Id. at 561. The Court then concluded that the witness was subject to cross-examination notwithstanding his forgetfulness because he answered questions regarding his prior statements and the factfinder could evaluate his prior statements in light of his present inability to remember the factual basis underlying them. Id. at 562.

We first note that the Rule 801(d)(1) standard is not identical to that contained in the Sixth Amendment's Confrontation Clause. See United States v. DiCaro, 772 F.2d 1314, 1325 (7th Cir. 1985) (citing Dutton v. Evans, 400 U.S. 74, 86 (1970)), cert. denied, 475 U.S. 1081 (1986). The Confrontation Clause, which we discuss below, protects the accused's right to "an opportunity for effective cross-examination." See Owens, 484 U.S. at 559. In contrast, Rule 801(d)(1) requires that the witness be subject to cross-examination concerning the prior consistent statement only. The Rule does not require cross-examination concerning the events underlying the statement or the matter asserted therein. See 4 David W. Louisell & Christopher B. Mueller, Federal Evidence § 419, at 179-80 (1980).

A.T. testified at trial and answered questions on cross-examination. Over the course of two days, the defense asked A.T. approximately 348 questions on cross-examination, covering nearly fifty-one pages of trial transcript. On the first day, A.T.

answered all of the questions posed to her, all of which were background questions or otherwise not directly related to her allegations of abuse.

Cross-examination on the second day was more difficult. The defense asked about 249 questions, approximately sixty-six of which elicited no audible or discernible response. Defense counsel began by asking A.T. about her meetings with the prosecutor on Tuesday, the day between her first and second days of cross-examination. A.T. acknowledged that she met with the prosecutor for a short period of time but was very reluctant to discuss the content of those conversations, generally stating that she did not remember the specific things they talked about. Except for a few questions about her conversations with the prosecutor, however, A.T. eventually responded to the substance of all of the defense's inquiries.[3]

Thereafter, defense counsel began asking A.T. about her allegations of abuse. After a few questions, the district court called for a recess and made observations on the record about A.T.'s testimony on cross-examination.[4] When questioning resumed,

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[3] We note that when A.T. initially failed to respond, the questions often concerned seemingly irrelevant material. For example, the record contains a series of eight questions about whether A.T. ever helped her grandfather care for his sheep. Five of those questions yielded no audible response; the other three established that A.T. could not remember helping to take care of her grandfather's sheep.

[4] The court stated:

> The record should reflect that when questions are asked of this witness, the questions which she has answered, that the answers are given reasonably quickly, that is within two, three or four seconds in most cases.

(Footnote Continued on Following Page)

defense counsel asked A.T. many questions about to whom she may have mentioned the abuse, and A.T. answered all but a few of those questions. Her answers ranged from specifically acknowledging or denying making certain statements to claims of forgetfulness. Although she failed to respond initially to this line of questioning, it often was the result of imprecise cross-examination. For example, defense counsel asked A.T. four times whether she remembered talking to a counselor, and four times failed to elicit an audible response, before learning that A.T. did not know what a counselor was. At one time, the court admonished defense counsel, suggesting that the questions might be too complicated for the six- and one-half-year-old witness.

(Footnote Continued from Previous Page)

> But in many cases where a question is asked and the witness does not respond, she has not responded except -- excuse me. It has -- integrals [sic] of time have elapsed between the time that the question is finished until the next question is asked of up to as much as 45 or 50 seconds.
>
> I don't know what the reason for that is of the witness' inability to comprehend. I sense that some questions are in that category, but there are other questions that appear to be rather simple questions, and the witness nevertheless has not responded and has waited for the next question as much as, as I say, 40, 45 seconds, many times 20 seconds, 25 seconds. And I've been timing that with my watch.
>
> * * *
>
> We have a very unusual situation insofar as this witness is concerned. I would note also on the record that when we started this recess, the witness seemed to be losing concentration. She would look up to the ceiling, would look to the back of the courtroom, she would look over my head, would not in instances face counsel who is inquiring of her.
>
> She twisted and turned, stretched a little bit sometimes. At other times she would put her hand to her mouth and clasp her lips with her hand. We have a very difficult situation here.

We are mindful that Rule 801's cross-examination requirement "should not be viewed as an empty formalism which can be satisfied by the mere fact that the witness is present and can be required to sit still long enough for questions to be put." Id. at 181. Nevertheless, we conclude that A.T. was subject to cross-examination concerning her prior statements alleging abuse. Although A.T. was reluctant to answer some questions and testified that she did not remember making certain statements, she did ultimately answer most of defense counsel's questions. Our reading of the record reveals that A.T. responded to simple and specific questions about specific persons. Indeed, Tome does not identify any specific topic or issue that he feels was important but about which A.T. would not respond. In short, A.T. did willingly respond to Tome's inquiries on cross-examination.

In addition, where the witness answers numerous questions regarding the prior statements, all of the purposes of cross-examination are served. Cross-examination under oath insures that the factfinder can observe the witness's demeanor while responding to questions in a formal setting. It also enables the defense to probe the circumstances under which the statement was made in order to call into question the accuracy or sincerity of the earlier statement. Those conditions clearly resulted from Tome's cross-examination in this case. Moreover, when the child witness answers some but not all of the questions, the factfinder may have an even greater insight into the witness because it can observe the witness's demeanor while both answering and remaining silent. Under these circumstances, we find that A.T.'s general

responsiveness and the jury's ability to observe her demeanor on the stand made her "subject to cross-examination" for purposes of Rule 801.

(2) Implied Charge of Recent Fabrication

Tome next contends that Rule 801 was not applicable because defense counsel did not charge A.T. with recent fabrication or improper motive. It is true that "not every attempt to impeach a witness's credibility constitutes a charge of fabrication." Gaines v. Walker, 986 F.2d 1438, 1444 (D.C. Cir. 1993); see also United States v. Cherry, 938 F.2d 748, 755 (7th Cir. 1991). The trial court has discretion, however, to determine whether the prior consistent statement is offered for such a purpose. See United States v. Herring, 582 F.2d 535, 541 (10th Cir. 1978); see also United States v. Montague, 958 F.2d 1094, 1098 (D.C. Cir. 1992).

In this case, the defense's questions on cross-examination clearly implied that A.T. had fabricated the allegations of abuse out of a desire to live with her mother. Defense counsel questioned A.T. at length regarding her preference for living with her mother. A.T. testified that she had friends in Colorado but none in New Mexico, and that she missed her mother when in New Mexico but did not miss her father when in Colorado. Because this line of questioning attacked more than her general credibility or memory, we find that the district court did not abuse its discretion in concluding that the defense had impliedly charged A.T. with fabricating the abuse. See United States v. Red

Feather, 865 F.2d 169, 171 (8th Cir. 1989) (applying Rule 801(d)(1)(B) where defendant implied on cross-examination that child sexual abuse victim was coached by social services counselors and was prejudiced against her father because of prior punishment and discipline); see also State v. Newman, 790 P.2d 971, 975 (Mont. 1990) (applying state version of Rule 801 where defense repeatedly referred to child sexual abuse victim's possible motives for falsely accusing defendant).

(3) The Pre-motive Rule

Finally, Tome contends that Rule 801(d)(1)(B) does not apply because all of the prior statements were made after A.T.'s alleged motive to fabricate a story of abuse arose. Whether the rule includes such a limitation is an issue of first impression in this circuit.[5] The proper interpretation of the rule is a question of law which we review de novo.

While we have not yet had occasion to decide this issue, it has divided the other circuits for years. Although the text of the rule is silent on this point, some circuits require that the declarant's prior consistent statement precede the time that the alleged motive to lie arose. See, e.g., United States v. Guevara,

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[5] The government contends that this circuit rejected the pre-motive rule in United States v. Rios, 611 F.2d 1335 (10th Cir. 1979), cert. denied, 452 U.S. 918 (1981). The pre-motive rule, however, was not at issue in that case. Rather, Rios involved the use of prior consistent statements to counteract the defense's cross-examination regarding the witness's prior inconsistent statement. Id. at 1349. The issue was whether the prior consistent statement had to precede the prior inconsistent statement; we said no. Id. While discussing the "order" of certain evidence under the Rule, we did not discuss the witness's motives at the time of making the earlier statements.

598 F.2d 1094, 1100 (7th Cir. 1979); United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978). Other circuits reject the so-called "pre-motive rule" and do not require the prior consistent statement to precede the alleged motive to lie. See, e.g., Montague, 958 F.2d at 1098; United States v. Pendas-Martinez, 845 F.2d 938, 942 n.6 (11th Cir. 1988); United States v. Parry, 649 F.2d 292, 296 (5th Cir. Unit B, June 1981).[6] We too reject the pre-motive rule and decline Tome's invitation to limit Rule 801(d)(1)(B)'s scope to statements made prior to the existence of the declarant's motive to fabricate.

Those courts that have adopted the pre-motive rule reason that prior consistent statements are "of no probative value to rebut an allegation of recent fabrication when the declarant's motive in making both statements was the same for the simple reason that mere repetition does not imply veracity." United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985) (internal quotation omitted). This may be true. As articulated, however, the pre-motive requirement is a function of the relevancy rules, not the hearsay rules. See Montague, 958 F.2d at 1098; United States v. Miller, 874 F.2d 1255, 1272 (9th Cir. 1989). But even as a function of relevance, the pre-motive rule is clearly too broad: a per se rule is untenable because it is simply not true that an individual with a motive to lie always will do so. Rather, the relevance of the prior consistent statement is more

[6] Because the government offered the statements for their full substantive effect, we do not examine the applicability or interpretation of Rule 801(d)(1)(B) with respect to statements offered only to rehabilitate the live testimony. See United States v. Casoni, 950 F.2d 893, 905 (3rd Cir. 1991).

accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie.[7]

In rejecting the pre-motive rule, however, we do not overlook or devalue the veracity concerns which underlie the rule. To the contrary, we recognize that prior consistent statements made after a strong motive to lie has arisen may evidence only that the declarant is a consistent liar. To determine whether a statement has probative value apart from its repetition, we follow the approach taken by the Ninth Circuit in Miller.[8] Miller treats a declarant's motive to lie as only one factor -- albeit a crucial one -- to be considered when evaluating the relevancy of a prior consistent statement under Federal Rules of Evidence 402 and 403. Id. at 1274. In doing so, "the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant 'probative force bearing on credibility apart from mere repetition.'" Id. (quoting United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986)).

In Miller, the court applied this test to the out-of-court statements of two witnesses. The case involved the espionage

[7] Indeed, courts that have adopted the pre-motive rule appear to factor such information into the equation when determining whether a sufficient motive to lie arose. See, e.g., Cherry, 938 F.2d at 756.

[8] The statements at issue in Miller were offered only to rehabilitate the trial witness's testimony, not for the truth of the matter asserted. 874 F.2d at 1272. The court, however, held that the standards for admission under Rule 801(d)(1)(B) are the same whether the evidence is offered substantively or for rehabilitation. Id. at 1273. The analysis, therefore, applies equally to the admission of prior statements as substantive evidence.

prosecution of Richard Miller, an agent for the Federal Bureau of Investigation who delivered classified documents to two emigrees from the Soviet Union, Svetlana and Nikolay Ogorodonikova. Svetlana testified during Miller's trial that Miller had never shown or given her a classified document. When the government attempted to impeach that testimony, Miller sought to rehabilitate her testimony through evidence of seven prior consistent statements made by Svetlana. After rejecting a strict pre-motive requirement, the court affirmed the exclusion of the statements. The court found that, because all of them were made to federal agents or defense attorneys while she was under criminal investigation or indictment, her motive to fabricate was "powerful," thus stripping the "self-serving" statements of "any significant probative value." Id. at 1274.

In contrast, the court affirmed the admission of prior consistent statements made by Marta York, a government witness and Miller's ex-lover. York testified that Miller had told her that he had given one classified document to his "Soviet girlfriend." Id. at 1275. When the defense attacked that testimony on cross-examination, the government sought to rehabilitate her testimony by introducing evidence that she had repeated Miller's claim to a friend. The defense contended that the prior consistent statement was not relevant because York was upset about her broken love affair with Miller and thus had a motive to lie. Id. The court found that the prior statement, which was made spontaneously, was subject to only a speculative motive to fabricate and had enough probative value independent of its consistency with the witness's

trial testimony to be presented to a jury. Id. Similarly, in United States v. Payne, 944 F.2d 1458, 1471 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1598 (1992), the court addressed the admissibility under Rule 801(d)(1)(B) of prior consistent statements made by a sexually abused foster child. The defense argued that the victim "may have been angry" at the defendant and therefore "falsely accused him for revenge." Id. at 1471 n.12. The court, however, affirmed the admission of the prior consistent statements, finding that the alleged motive to lie was too speculative. Id. at 1471.

Applying this analysis to the present case, we conclude that the district court properly admitted evidence of A.T.'s prior consistent statements under Rule 801(d)(1)(B). The record reveals that A.T. spontaneously made her initial allegation of abuse to her baby-sitter. On cross-examination, Tome implied that A.T. fabricated the allegations about her father because she wanted to live with her mother. Although this argument does present some motive to lie, we do not believe that it is a particularly strong one. See Payne, 944 F.2d at 1471. Moreover, Tome's contention would require us to believe that A.T.'s statements were the result of a calculated scheme to deceive. Yet Tome has presented no evidence that the five-year-old A.T. possessed the ability to appreciate the causal relationships inherent in the conception and implementation of such a scheme. See id.; see also State v. Robinson, 611 A.2d 852, 858 (Vt. 1992) (finding defense's claim that child fabricated story of sexual abuse because of attention he received from it highly speculative). Under these

circumstances, we believe that A.T.'s consistent statements do carry probative force apart from mere repetition.[9] We therefore find no abuse of discretion in admitting these prior consistent statements.[10]

B. Confrontation Clause

Tome contends that, even if the testimony concerning A.T.'s out-of-court statements was admissible under the Federal Rules of Evidence, its admission nevertheless violated his constitutional rights under the Sixth Amendment's Confrontation Clause.[11] We review claims under the Confrontation Clause de novo. See United States v. Ellzey, 936 F.2d 492, 495 (10th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 400 (1991).

"The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). Although an out-of-court statement related by a witness at trial constitutes "testimony" against the accused, "the Confrontation Clause is not

[9] We do not decide whether this result would obtain where the defendant presents evidence of "coaching" by a parent or relative. Although Tome makes stray accusations that A.T.'s mother coached A.T. into making these statements, he does not rely on that argument and cites no evidence in the record in support of that assertion.

[10] Tome did not object that the admission of all of these statements together rendered them more prejudicial than probative under Fed. R. Evid. 403, and we find no plain error.

[11] The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." California v. Green, 399 U.S. 149, 158 (1970). Here, the out-of-court declarant, A.T., was physically present on the witness stand for cross-examination. Tome contends, however, that his right to conduct cross-examination was violated because the witness did not respond sufficiently to his questions. We disagree.

It is clear that "simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns." United States v. Spotted War Bonnett, 933 F.2d 1471, 1474 (8th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1187 (1992); see United States v. Dorian, 803 F.2d 1439, 1446 (8th Cir. 1986) (concluding that five-year-old witness was unable to testify meaningfully because of age and fright); see also Commonwealth v. Kirouac, 542 N.E.2d 270, 272-74 (Mass. 1989) (witness resisted answering nearly all questions asked during cross-examination). Ours is not, however, a situation where the child witness was unable to answer questions on the stand. Rather, as discussed above, the record includes fifty-eight transcript pages of A.T.'s cross-examination during which she was generally responsive. Tome nevertheless challenges the sufficiency of the cross-examination because, in response to a number of questions, A.T. either gave no audible response or testified that she could not remember many things.

The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is

effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985). The concerns animating the Confrontation Clause are satisfied as long as the defendant has the opportunity to expose weaknesses in the witness' testimony. See Owens, 484 U.S. at 559; see also Kentucky v. Stincer, 482 U.S. 730, 744 (1987). Forgetfulness, for example, does not render cross-examination constitutionally infirm because the defense can use the witness's poor memory and trial demeanor to attack the witness's credibility. Owens, 484 U.S. at 559-60; Fensterer, 474 U.S. at 20. In this case, the defendant likewise had the opportunity to mount a successful attack against the partially nonresponsive witness and, in fact, rarely missed an opportunity to comment on the difference between A.T.'s testimony on direct and on cross-examination. Therefore, notwithstanding A.T.'s failure to respond to some questions on cross-examination, we find that Tome's rights under the Confrontation Clause were not violated because A.T.'s testimony provided him a sufficient opportunity to discredit her out-of-court statements.

III. Use of Leading Questions

The trial judge permitted the government to use leading questions during A.T.'s direct examination. We review that decision for an abuse of discretion. See United States v. Rodriguez-Garcia, 983 F.2d 1563, 1570 (10th Cir. 1993). "In this realm the widest possible latitude is given to the judge on the scene." Rodriguez v. Banco Cent. Corp., 990 F.2d 7, 12 (1st Cir. 1993).

Fed. R. Evid. 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." This circuit has long recognized the necessity of using leading questions to elicit testimony from child sex abuse victims. See Antelope v. United States, 185 F.2d 174, 175 (10th Cir. 1950). Indeed, the Advisory Committee Notes to Rule 611(c) expressly identify the examination of child witnesses as an exception to the general prohibition on the use of leading questions during direct examination. Fed. R. Evid. 611(c) advisory committee's note; see also United States v. Castro-Romero, 964 F.2d 942, 943-44 (9th Cir. 1992) (leading question used during direct examination of 8-year-old sex abuse victim).

In this case, A.T.'s direct examination did involve a significant number of leading questions. It is evident from the record, however, that A.T. was reluctant to testify about her abuse. In fact, questioning was halted several times in order for A.T. to regain her composure and willingness to discuss the events at issue. The defense twice objected to the leading questions; both times the district judge decided to permit them. Under these circumstances, we cannot say that the district court abused its discretion in determining that leading questions were necessary to develop A.T.'s testimony.

IV. Cumulative Error and Fundamental Unfairness

Finally, Tome argues that "[t]his Court need not decide whether the individual errors discussed herein require reversal of

Tome's conviction; it is clear that the cumulative effect of those errors rendered the trial in this case fundamentally unfair." We interpret this assertion to raise two distinct arguments.

First, Tome appears to make a preemptory strike at a potential harmless error analysis. In this regard, he contends that, even if the alleged trial errors were individually harmless, they were not harmless in the aggregate. This argument is unavailing, however, because we already have concluded that the trial court's individual rulings were not erroneous. "[A] cumulative-error analysis aggregates only actual errors to determine their cumulative effect." United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (emphasis added); see also United States v. Haar, 931 F.2d 1368, 1377 (10th Cir. 1991) (effect of non-errors not included in aggregation).

Second, we interpret Tome's argument to challenge the "fundamental fairness" of his trial under the Due Process Clause of the Fifth Amendment. A trial is fundamentally unfair under the Fifth Amendment's Due Process Clause if it is "shocking to the universal sense of justice." United States v. Russell, 411 U.S. 423, 432 (1973) (internal quotation omitted). In Rivera, we noted that courts may consider prejudicial circumstances that do not amount to error in the course of reviewing for fundamental unfairness, but only when actual error has also occurred. 900 F. 2d at 1477. Thus, "the linchpin of the analysis seems to be that an error was committed which, when considered with other circumstances, led to a fundamentally unfair trial." Id.

Here, as in Rivera, Tome requests a fundamental unfairness analysis without any actual error on which to hang his proverbial hat. Tome contends that this is a case where the government's scripted evidence, introduced through leading questions, and the defense's inability to cross-examine the source of that evidence combined synergistically to deny the defendant a fair trial. However, we already have approved of the use of leading questions in this case and have determined that A.T. was available for cross-examination under both Rule 801 and the Confrontation Clause. Moreover, the record reveals that the defendant presented his own witnesses and evidence while mounting a continuing attack on the credibility of the government's witnesses, A.T. included. The fact that a number of important evidentiary issues were decided against him, and that the jury chose to believe the government's witnesses rather than his, simply does not shock any universal sense of justice. Tome's trial, though not perfect, was fair.

We **AFFIRM**.

United States' District Court
for the District of New Mexico

FILED
UNITED STATES DISTRICT COURT
SANTA FE, NEW MEXICO

MAY 2 2 1992

CLERK

UNITED STATES OF AMERICA

V.

JUDGMENT IN A CRIMINAL CASE

Name: MATTHEW WAYNE TOME
DOB: 05-22-65
SSN: 585-08-5916

Case Number: 91-314 SC

Co. Reg.
To Vote: McKinley County

Mailing Address: Post Office Box 664
Shiprock, NM 87420

Ann Steinmetz (Appointed)
Attorney for Defendant

Residence Address: Same as above

ENTERED ON DOCKET
MAY 2 2 1992

THE DEFENDANT ENTERED A PLEA OF:

__ guilty ___ nolo contendere as to _____ and
__ not guilty as to count(s)_____.

THERE WAS A:

_ finding _X_ verdict of guilty as to one-count Indictment filed on June 4, 1991
___As tried to the Court. _X_ As tried before a Jury.

THERE WAS A:

__ finding _X_ verdict of guilty as to one-count Indictment filed on June 4, 1991
__.
___judgment of acquittal as to count(s) _____.
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: (Fel. _X_ Misd. ____).

Crime on an Indian Reservation: Aggravated Sexual Abuse, 18 U. S. C. § 1153, 18 U. S. C. § 2241(c) and 18 U. S. C. 2245(2)(A)(B) as charged in the one-count Indictment filed on June 4, 1991.

* SETTING *
5/27/92
CALENDARED

ATTACHMENT B

(Continuation Sheet)

The Court adopts the factual findings and guideline applications in the presentence report except for the application of Section 2A3.1(b)(1) as a specific offense characteristic, and reduces the base offense level by four (4) levels, and finds that there is no need for an evidentiary hearing as there are no other disputed facts.

The Court finds that the offense level is now thirty-three (33) and the criminal history category is I, establishing a guideline imprisonment range of 135 to 168 months. The Court takes judicial notice that the defendant had sexual intercourse with his four (4) year old daughter in order to gratify his sexual desires. The instant offense however, is the defendant's first felony conviction.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court as to the Indictment that the defendant, Matthew Wayne Tome, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 144 months. Upon release from confinement, the defendant shall be placed on Supervised Release for a term of three (3) years. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the nearest U. S. Probation Office in the district to which he is released. While on supervised release, the defendant shall not commit nay federal, state, or local crime, shall not possess illegal controlled substances, shall comply with the standard conditions of supervised release adopted by the Court on January 3, 1990, and the following special conditions.

1) The defendant shall not possess firearms, explosives or other dangerous weapons.

2) The defendant shall participate as directed in a program for substance abuse approved by the U. S. Probation Office, which may include testing to determine whether the defendant has reverted to the use of alcohol.

Pursuant to the Victim and Witness Protection Act of 1982, the Court finds that the defendant's lack of financial resources outweighs the need to provide restitution, therefore, restitution will not be imposed.

Based on the defendant's lack of financial resources, the Court will not impose a fine or an additional fine which will pay government costs of any imprisonment or supervised release.

The Court finds the defendant is not a flight risk, therefore voluntary surrender will be granted for June 30, 1992.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Three of this judgment are imposed.

Name: TOME, Matthew Wayne
Case Number: 91-314 SC

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer.
(2) associate only with law-abiding persons and maintain reasonable hours.
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes.)
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.
The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is further ordered that the defendant shall pay to the United States a Special Assessment of $50, which shall be due immediately and payable by cashier's check, bank or postal money order, to the United States District Court Clerk, Post Office Box 689, Albuquerque, New Mexico 87103.

Original Fine Amount: _____
Amount Due: _____
Schedule of Payments: _____
_____

Original Restitution Imposed: _____
Amount Due: _____
Payable To: _____
_____

Schedule of Payments: _____
_____
_____

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that _____ be DISMISSED on the motion of the United States.

93-0692

Page Four

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

X The Court orders commitment to the custody of the Bureau of Prisons and recommends:

The Court recommends FCI Safford, Arizona

In accordance with Rule 32(a)(2) of the Rules of Criminal Procedure, you have the right to appeal the entry of judgment within ten (10) days, and you have the right to apply for leave to appeal in forma pauperis if unable to pay the cost of an appeal.

May 15, 1992
Date of Imposition of Sentence

Santiago E Campos
Signature of Judicial Officer

Santiago E. Campos U.S. District Judge
Name and Title of Judicial Officer

MAY 2 2 1992
Date

Review of Sentence: Pursuant to 18 USC 3742, within ten (10) days of the entry of judgment, you have the right to appeal the final sentence of the Court imposed on an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 USC 994(1). You have the right to apply for leave to appeal in forma pauperis if unable to pay the cost of an appeal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

RECEIVED
MAY 2 7 1992
FEDERAL PUBLIC DEFENDER

_____
United States Marshal

By: _____

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MATTHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Joseph W. Gandert, declare under penalty of perjury that I am a member of the bar of this Court and as counsel for Matthew Wayne Tome, petitioner, that I personally mailed a copy of the Petition for Writ of Certiorari by first class mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, DC 20530, this 24 day of November, 1993.

Joseph W. Gandert

Joseph W. Gandert
Attorney for Petitioner
Federal Public Defender
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293